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No. 42.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

OTTO OLSEN, PLAINTIFF IN ERROR,

vs.

A. D. SMITH, L. LUTH, L. BEST, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, FOURTH JUDICIAL DISTRICT OF TEXAS.

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STATEMENT.

On the 4th of December, 1900, the defendants in error brought this, their joint action against the plaintiff in error, alleging that they were the duly qualified and commissioned branch pilots for the port of Galveston; and that they, and no others, are authorized to perform the duties of their offices, and to pilot in and out of the port of Galveston, sail vessels and registered steamers;

That plaintiff in error is neither a branch nor a deputy pilot and has no right or authority either to act or offer his services as a pilot to any vessel of the class mentioned; but, notwithstanding such want of right or power, he assumes to serve, and is actually serving, as a pretended pilot to incoming and outgoing vessels and is occasionally taken on board and employed as a pilot, contrary to law;

That plaintiff in error states his purpose to so continue holding himself out as a pilot and to guide the movements of arriving and

departing vessels at the port of Galveston, and defendants in error believe and aver that he will carry out his unlawful intentions unless restrained;

That plaintiff in error, by his unlawful acts and conduct, and his avowed determination of persisting therein, has caused and is causing defendants in error, irreparable injury, to their damage fifteen hundred dollars ($1500);

That by piloting vessels in and out of port, he prevents defendants in error from exercising to some extent their official rights and duties as pilots and from earning and receiving the fees and compensation allowed by law;

That as plaintiff in error is insolvent, defendants in error have no adequate remedy except by injunction;

That the acts of the plaintiff in error are unlawful and an intrusion upon the rights of defendants in error, and, to the extent named, prevent them from discharging their duty as public officers, and that plaintiff in error practically denies the right of this State to enforce its system of pilotage laws;

Wherefore, they pray that plaintiff in error be enjoined from piloting or attempting to pilot sail vessels or registered steamers, bound to or from foreign ports, in and out of the port of Galveston. (Tr., 1-3.)

To this petition plaintiff in error demurred and filed his amended original answer, in which he alleges that he is a citizen of the United States and of the State of Texas, and has resided continuously for more than ten years at the port of Galveston, which is a greater term of residence in the State than that required by law of branch pilots; that he is an experienced and skilled seaman and holds a license under the laws of the United States as a pilot of coastwise steam vessels for the port of Galveston, is familiar with the harbor and the entrance thereto; has served for more than five years as a pilot at that port, and is in all respects qualified to act as a branch pilot, although he has never served as deputy

pilot; that he has repeatedly, within the last three years, requested the Board of Commissioners of Pilots to examine him as to his qualifications to act as branch pilot and to report their findings to the Governor of this State; but they refuse to comply with his request, claiming that, under the laws of this State they have no authority or right to examine any one for the position of branch pilot unless the applicant has been appointed by and has served as deputy pilot under one of the defendants in error for a term of one year.

Plaintiff in error then offered to prove his competency and skill as a pilot in any manner the Court might deem proper.

He admits that each of defendants in error is a branch pilot and entitled to serve as such at the port of Galveston, but alleges that they have associated themselves together as partners under the name of the Galveston Pilot Association; that they pool their earnings and share equally in the profits and losses; that they and each of them refuse to appoint him a deputy, and contend that no one can become a branch pilot unless he has been appointed a deputy by one of them and has served as such for one year, the period of probation fixed by the Board of Commissioners of Pilots; that such refusal and claim has the effect of preventing competition and gives them the exclusive pilot service of the port and the emoluments thereof; that they control the pilotage of the port and have prevented him and all others from acting as deputy or branch pilots in competition with them.

That all vessels that he has piloted, or tendered his services to pilot, into or out of the port of Galveston are British vessels, and that under the laws and treaties of the United States he has the right to pilot such vessels into and out of that port.

He denies that defendants in error have any exclusive right to conduct the pilotage at the port of Galveston, or that they can take from him his right to enjoy, upon terms of equality with all

others in similar circumstances, the liberty to pursue his calling, profession or trade as a pilot.

To this answer defendants in error filed a general demurrer and special exceptions.

On the 11th day of November, 1901, the Court overruled plaintiff-in-error's demurrer and exceptions to defendants-in-error's petition, sustained defendants-in-error's demurrer and exceptions to plaintiff-in-error's answer, and enjoined plaintiff in error from acting as a pilot in accordance with the prayer of the petition. (Tr., 8.)

From this judgment the plaintiff in error on the 27th day of December, 1901, prosecuted a writ of error to the Court of Civil Appeals for the First Supreme Judicial District at Galveston, Texas. (Tr., 9.)

On the 30th day of January, 1902, the cause was transferred to the Court of Civil Appeals for the Fourth Judicial District at San Antonio, Texas. On the 23d of April, 1902, that Court modified, reformed and affirmed the judgment of the lower Court. (Tr., 14-20.) Plaintiff in error on the 2d of May, 1902, filed a motion for a rehearing (Tr., 22), which was on the 21st of May, 1902, overruled. On the 25th day of June, 1902, the application of plaintiff in error to the Supreme Court of the State of Texas for a writ of error was refused. (Tr., 24.)

Thereafter the plaintiff in error filed his petition for a writ of error to the Supreme Court of the United States, together with assignments of error and a supersedeas bond. The petition was allowed, the supersedeas bond approved, the writ of error duly filed in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, it being the highest court in the State of Texas in which a decision in this case could be had, and citation was waived, and service accepted by the defendants in error on the 24th of April, 1903. (Tr., 25-29.)

The case is now before this Court for review upon the following assignments of error.

ASSIGNMENTS OF ERROR.

1st. The Court erred in holding that the statute of the State of Texas (Rev. Stats., Arts 3800, 3801 and 3802), that gives to the pilot, whose services are offered to and refused by a vessel outside of the bar, a claim for half pilotage against the vessel, and a claim for a forfeit of $50.00 against the person piloting such vessel into or out of the port of Galveston, and then exempts certain vessels from the provisions of the act, is valid and not in conflict with the Constitution, laws and treaties of the United States.

2d. The Court erred in holding that the defendants in error have the right to combine and to prevent competition in pilotage at the port of Galveston, and that the statutes of the State of Texas that authorize such a combination are not in conflict with the anti-trust law of the United States (26 U. S. Stats., 209c, 647), nor in violation of paragraph 3, Section 8, Article I, of the Constitution of the United States.

3d. The Court erred in holding that the statute of the State of Texas prescribing the qualifications and regulating the appointment of branch pilots is valid and does not abridge the privileges or immunities of plaintiff in error as a citizen of the United States, nor deprive him of his liberty and property without due process of law, nor deny him the equal protection of the law as guaranteed him by the first section of the Fourteenth Amendment of the Constitution of the United States.

4th. The Court erred in rendering judgment against plaintiff in error upon the pleadings in said cause, in that said judgment is contrary to the law and the facts as stated in the pleadings therein.

ARGUMENT.

The first assignment raises the question of the validity of the following provisions of the Revised Statutes of Texas (1895):

"ART. 3800. The rate of pilotage on any class of vessels shall not, in any port of this State, exceed four dollars for each foot of water which the vessel at the time of piloting draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot, whose services she so declined, for the payment of half pilotage; and any vessel, which after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before she came in, but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. At any port where vessels shall receive or discharge their cargoes at an anchorage outside of the bar, such vessel shall be liable to pilotage at the above rate to such anchorage, but shall not be liable for or compelled to pay pilotage from such anchorage to the open sea; and if any vessel bound from the open sea to such anchorage, while under way, shall decline the services of a pilot, and shall afterwards receive or discharge any portion of her cargo at such anchorage, on the lighters or otherwise, she shall be liable for the payment of half pilotage, at the above rate, to such anchorage to the first pilot whose services shall have been tendered to and declined by her, but not liable for any pilotage from such anchorage to the open sea; and when a pilot takes charge of a vessel twenty miles outside of the bar, and brings her to it, he shall be entitled to one-fourth pilotage for such off-shore service,

in addition to what he is entitled to recover for bringing her in, but if such off-shore service be declined, no portion of said compensation shall be recovered."

"ART. 3801. The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to wit: All vessels of twenty tons and under, all vessels of whatsoever burthen owned in the State of Texas and registered and licensed in the district of Texas, when arriving from or departing to any port of the State of Texas; all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the State of Texas; all vessels of seventy-five tons or under owned in the State of Texas and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States."

"ART. 3803. If any person not appointed a branch or deputy pilot shall pilot any ship or vessel out of or into any port when a branch or deputy pilot has offered such service, the person so piloting shall forfeit and pay to such branch or deputy pilot the sum of fifty dollars, to be recovered before any Court having cognizance of the case."

When the Constitution of the United States was adopted, the power to regulate commerce with foreign notions, and among the several States, which includes the right to regulate pilots and pilotage, was conferred upon Congress. At that time the channels of the various harbors and rivers in the United States were not known except to the local pilots. There had been no surveys, no charts, no buoys and no improvements made by the Federal Government. Congress recognizing these facts, on the 7th day of August, 1789, passed an act which provides:

"SEC. 4235 (U. S. Rev. Stats.) Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity

with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose."

For the purpose of preventing any State from discriminating in favor of its citizens and vessels, Congress in 1866 enacted the following law:

"SEC. 4237 (U. S. Rev. Stats.) No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

With the view of still further limiting the right of the States to regulate pilotage and to extend Federal control over the same, Congress in 1871 enacted:

"No state or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation, which will impede such pilots in the performance of the duties required by this title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided by this title; and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State." (Sec. 4444, U. S. Rev. Stats.)

Construing the exemptions enumerated in Article 3801 of the Revised Statutes of Texas, with the Acts of Congress above quoted, and also with the Federal Constitution, we find that the State statute is repugnant to the federal law in three particulars:

1st. It exempts from pilotage all vessels of whatsoever burthen, owned in the State of Texas, and registered and licensed in the district of Texas, when arriving from or departing to any port of that State, thus discriminating in favor of Texas ports, and against those of other states, and also conferring upon citizens of Texas exemptions and privileges that are denied the citizens of other states.

2d. It exempts all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any port of the United States, when arriving from or departing to any port in the State of Texas. This is a discrimination against the ports of other states of the Union and in favor of Texas ports. (U. S. Const., Art. I, Sec. 9, clause 5.)

3d. It exempts all vessels of seventy-five tons and under, owned in the State of Texas, and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States. This is a privilege in favor of vessels owned and licensed in Texas, and a discrimination against vessels owned by citizens of other states. (U. S. Const., Art. IV, Sec. 2, clause 1.)

The Court of Civil Appeals held that while these provisions of the State statute are in conflict with the laws of Congress, yet the objectionable provisions are separable from the rest of the provisions, and may be eliminated, and leave the remainder of the act in force. (Tr., 16.)

When these acts of Congress were passed, a portion of the provisions of the Texas statute now under discussion were embraced in one section. (Oldham & White's Dig., Art. 1585.) The Legislature, in 1879, when it revised and adopted this statute,

instead of amending it to conform to the federal law, enlarged and re-enacted it in two sections. It was again re-enacted as Arts. 3800, 3801, in the Revised Statutes of 1895.

If we eliminate from the statute the exceptions referred to by the Court of Civil Appeals, then, under the provision of Art. 3800, all vessels, except those of twenty tons burthen and under are required by this statute to pay pilotage, even though they be coastwise steam vessels that are exempt by the act of Congress. (U. S. Rev. Stats., Sec. 4444.)

This article of the State statute, in fixing the rate of pilotage and designating the vessels that shall be liable for the same, expressly provides that the provisions of the law shall not apply to vessels of the excepted classes. Then follows Article 3801, in which the illegal exceptions appear. To make these two articles of the statute conform to the ruling of the Court of Civil Appeals, not only must all the provisions of Article 3801, except the first exception, be stricken out, but Article 3800 must also be amended, so as to exempt steam vessels engaged in coastwise trade.

If the whole of Article 3801 be eliminated, then every vessel of whatsoever burthen entering the port, whether a coastwise steam vessel or not, is liable under the remainder of the statute for half pilotage, and the person piloting a vessel into or out of the port, unless he is a branch pilot or a deputy, must forfeit and pay $50.00.

The articles under discussion clearly constitute one entire scheme, and the illegal provisions of the statute are so interwoven and connected that it seems impossible to separate them without substituting the opinion of the Judge for the expressed will of the Legislature. The Supreme Court of the United States in Sprague vs. Thompson, in construing a similar provision in the pilot law of the State of Georgia, where the Supreme Court of that State held that the illegal exceptions might be disregarded, so that the rest of the section might stand, said: "The insuperable difficulty

with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are therefore constrained to hold that the provisions of Section 1512 of the Code of Georgia, can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Section 4237 of the Revised Statutes."

Sprague vs. Thompson, 118 U. S. Rep., 94-5.

Freeman vs. The Undaunted, 37 Fed. Rep., 662.

The provisions of the State statute are void for the further reason that they are in conflict with the treaty of December 22, 1815, between the United States and Great Britain. A stipulation in the second article of that convention provides as follows:

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels." (Treaties and conventions between the United States and other powers published by the U. S. Government in 1889, p. 411.)

Under this treaty, which is the supreme law of the land, no State can impose any "higher or other duties or charges" on a British vessel in a port of this State than those payable in the same port by vessels of the United States. All vessels owned, registered and licensed in Texas are vessels of the United States. (U. S. Rev. Stats., Sec. 4131.)

The exemption of any vessel from the pilotage at any port in this State inures, under the terms of this treaty, to British vessels

entering and leaving such port. When the Legislature undertook to exempt all vessels owned, registered and licensed in Texas from charges for pilotage, unless for actual service, the benefits of such exemption at once extended, under the terms of this treaty, to British vessels.

Again, when Congress in 1871 (Rev. Stats., Sec. 4444), exempted American steam vessels engaged in coasting trade from the pilot laws of the several States, it thereby annulled the statute of Texas upon this subject, and relieved such vessels from certain pilot charges imposed in that State, and by so doing British vessels became and are entitled to the same exemptions, and the federal license of plaintiff in error entitled him to pilot the same.

Congress undoubtedly has the power to limit the coastwise trade to American vessels and also to exempt such vessels from pilotage or other port charges imposed by the several States; but these are separate and independent subjects, upon either or both of which Congress may legislate. This country's right to control and regulate its coastwise trade is in no way affected by this treaty; but, when Congress exempts any class of American vessels from duties or charges imposed at any of the ports of the United States, the benefit of such exemption inures at once to British vessels at such port. The right to engage in the American coastwise trade is not conferred upon British vessels, but the right to pay "no higher or other duties or charges" in any port of the United States than are paid in the same port by American vessels is guaranteed to British vessels by this treaty. It does not say that British vessels shall pay higher or other duties or charges in ports of the United States than American steam vessels engaged in the coasting trade pay, or that certain classes of American vessels may be exempted from such duties or charges without the same exemptions being extended to British vessels; but provides that in all cases, where American vessels are relieved from any duty or charge in any port of the United States, the same shall

extend to British vessels at that port. The language of this treaty is plain, and, when considered in the light of the international rule of a liberal interpretation of such treaties, there seems to be no doubt as to its meaning and intent. The rights of each nation under this treaty are determined not by the character of business in which the vessel may be engaged, but by the port charges and exemptions to which vessels may be subjected in their respective ports.

The right of the defendants in error to combine and prevent competition in pilotage is presented by the second error assigned. The allegations in the answer, which are admitted by the demurrer, show that the defendants in error, with the intent to prevent competition, have associated themselves together and are monopolizing the pilotage at the port of Galveston of vessels engaged in the transportation of traffic and commence among the several States and with foreign nations; that the combination is in restraint of trade and commerce between the several States and with foreign nations, and that the trade, traffic and commerce passing through the port of Galveston are restrained, hindered and injured by such combination.

The anti-trust law of Congress, passed July 2, 1890, (26 U. S. Stats., 209c, 647) is very broad and comprehensive in its terms. It prohibits all contracts or combinations that are or may be in restrain of trade or commerce, whether they were unlawful at common law or not, and whether they are unreasonably in restraint of commerce or not. (U. S. vs. Freight Ass'n, 166 U. S., 327.) Every contract, combination or conspiracy such as is shown in this case is included within the language of this statute, and, to use the words of the Supreme Court, "no exception or limitation can be added, without placing in the act, that which has been omitted by Congress." (Id., 328.) That defendants in error control and monopolize the pilotage at this port is clearly shown by the record. They seek the equity powers of the Court upon the

theory that they have an exclusive right, not only to the pilotage, but to combine for the purpose of pooling their earnings and preventing competition. As the business or official duties of defendants in error are inseparably connected with interstate and foreign commerce and the instrumentality thereof, Congress has the power to say, and has said by the act above referred to, that all such agreements, combinations and conspiracies which shall restrain trade or commerce by shutting out the operation of the general law of competition, are illegal. (U. S. vs. Joint Traffic Ass'n, 171 U. S., 569.) This is true, whether they act as individuals or as State officials, if the effect be to restrain interstate or foreign commerce, or the instrumentalities thereof, by stifling competition. The State could not, since the passage of this law by Congress, authorize or legalize such a combination. Every agreement affecting pilotage that destroys competition affects interstate and foreign commerce, and is in restraint of trade. (Id., 569.) To apply the language of the Supreme Court in that case, to the case now before the Court, "An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade." (Id., 577.) The construction of this law came again before the Supreme Court in Addyston Pipe & Steel Co. vs. U. S., 175 U. S., 211, and its scope and effect was again discussed. It was there contended, among other things, that the power of Congress to regulate commerce was limited to its protection from acts of interference by State legislation, or by means of regulations made under the authority of the State by some political subdivision thereof, and did not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object and result in a direct and substantial obstruction to or regulation of commerce. (Id., 227.) The Court admitted that the chief object of vesting in Congress the power to regulate interstate and foreign commerce

was to prevent unfriendly and discriminating State legislation, yet there was no such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those contracts which in effect regulate interstate or foreign commerce. The combination shown by this record, whether considered as a contract between private individuals or an association of officers authorized by State legislation, acts directly upon vessels, the instrumentality of commerce, and is necessarily a regulation of interstate and foreign commerce. Defendants in error by their association are able to and do deprive the public of the advantages of competition, not only between themselves, but with others. They have a complete monopoly; but if the association only tends to that end, and to deprive the public of any advantage that might result from free competition, it is in violation of this law. Upon this point the Supreme Court says: "All the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." (Id., 237.)

Northern Security Co. vs. U. S., 193 U. S., 197.

Montague & Co. vs. Lowry, 193 U. S., 38.

The public are interested in not only having competition in the rate of pilotage, but even more in having quick and efficient pilot service. The delay of a vessel in securing the services of a pilot often results in great loss, both in time and money. It is much more important for the public to have competition in the service than in the rate of pilotage. The fact that plaintiff in error offered his services and piloted vessels into port before defendants in error tendered their services, shows that they do not give the public that quick and efficient service that commerce demands and that competition would or might insure.

This law, which is unusually clear and forceful in its provisions and far-reaching in its effects, when considered in the light of its

construction by the Supreme Court, prohibits all contracts and combinations, the effect of which is to create a monopoly or to prevent free competition in traffic or commerce between the States or with foreign nations; or that hinders or impedes the instrumentalities of interstate or foreign commerce. The record in this case shows the Galveston Pilot Association to be such a combination.

Under the third error assigned the following proposition is submitted:

"The State can not declare a trade, profession, occupation or business, to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness, from pursuing such trade, profession, occupation or business. And the provisions of the Texas statute which declares a pilot to be an officer, and limits the number of citizens who can serve as pilots to the defendants in error, and such deputies as they may choose to appoint, are void."

The provisions of the State statute bearing upon this point are as follows:

"ART. 3791 (Rev. Stats.) Said Board of Commissioners shall be authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they find already appointed at the time of their organization; and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the Governor, where new appointments are proper, such as are meritorious; and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized, after a due hearing of accusation, testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office; the Governor shall, however, have power at his will and pleasure to

remove any branch pilot or to reinstate any one of the same who has been suspended by the Commissioners."

"ART. 3792. The Board of Commissioners of Pilots of each port shall require a certain term of residence in the State of Texas, not less than two years, to authorize any person to exercise the functions of branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year, as a deputy pilot, before any person can exercise the functions of branch pilot."

"ART. 3796. The Governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office the appointment shall be for the unexpired term."

"ART. 3797. Before entering upon the duties of his office each branch pilot shall enter into bond, with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the Governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond shall be approved by the Board of Commissioners of Pilots for the port, or if there be no such board, by the County Judge of the County in which the port is situated, and forward to the Governor, to be by him deposited in the office of the Secretary of State. Each pilot shall also take and subscribe the oath of office prescribed in the Constitution, which shall be endorsed on said bond, and together with the bond shall be recorded in the office of the Clerk of the County Court of the county in which such port is situated before being forwarded to the Governor; and certified copies of said bonds, under the hand and seal of the County Clerk, may be used as evidence in all the courts with like effect as the originals."

"ART. 3798. Each branch pilot may appoint, subject to examination and approval by the Board of Commissioners, two deputies, for whose acts the branch pilot so appointed shall be responsible;

and any branch pilot who shall appoint a deputy without the approval of said board, shall forfeit his own appointment; and the said board shall have authority to restrict all deputy pilots from piloting over the bar vessels of over a certain draught of water."

This statute, as construed by the highest courts having civil jurisdiction in Texas, confers upon defendants in error an exclusive right to carry on pilotage at the port of Galveston, and denies to all other citizens of the State and of the United States, whatever ther qualifications may be, the right to pursue their trade, occupation or business as a pilot, except such as defendants in error may see proper to deputize and permit to serve for one year. This statute limits the number of deputies that may be appointed and leaves it optional with branch pilots whether any deputies shall be appointed or not, and if one is appointed, the terms and conditions of the appointment are left to be fixed by agreement between the parties. The Court in Petterson vs. Board of Commissioners, 57, S. W. Rep., 1002, held that no one can be examined by the Board of Pilot Commissioners and recommended to the Governor for appointment as a branch pilot, or be appointed by the Governor, unless he has served under one of the branch pilots for one year. The authority of the Governor to appoint, and the right of the Board of Commissioners of Pilots to examine and recommend, are both dependent upon the appointment of deputies by the existing pilots. Thus the Legislature has limited the number of deputies and undertaken to delegate to defendants in error the power to select and limit the number of men who can become qualified to serve as branch pilots. Such a limitation and delegation of authority by the Legislature is illegal, whether a branch pilot be an officer of the State or not.

Willis vs. Owens, 43 Texas, 41.

People's R. Co. vs. Memphis R. Co., 10 Wall., 50.

Cooley's Constitutional Limitations (6th ed.), 137 and note 1.

This statute is also unconstitutional, because it "deprives" all citizens of the State of the "liberty" of pursuing one of the industrial avocations of life, takes from him the "property" which every man has or should have in his labor, and (if a pilot is an officer) disfranchises him from holding an office, without "the due course of the law of the land." These principles of the fundamental rights of the citizens of every free government are forcefully stated by the Supreme Court of Texas, in Brenham vs. Water Co., 67 Texas, 560, in this language:

"A grant which gives to one or an association of persons an exclusive right to buy, sell, make or use a given thing or commodity, or to pursue a given employment, creates a monopoly." And, "The allowance or creation of such exclusive right is contrary to the spirit of the Constitution of the State." (Id., 566.)

It is contended that the position of branch pilot is a public office, and therefore the Legislature can prescribe the duties and limit the number of persons who shall enjoy the privileges attached thereto.

A pilot is a seaman authorized by law to act as an officer of a ship in conducting her into and out of a port. His duties require that he should be able to navigate and manage a ship and have a knowledge of the harbor for which he has been licensed.

Hobart et al. vs. Drogan et al., 10 Pet., 123.

A commission from the State and a license from the United States government do not confer upon a pilot the right to perform any governmental functions; they simply authorize him to pursue his occupation, profession or calling within a certain locality, and this is all the statute should mean when it speaks of "the office of branch and deputy pilot." An office is a public charge or trust conferred by law for public purposes. A portion of the sovereignty of the country attaches to it, and it must pertain to the legislative, executive or judicial department of the government.

(Texas Const., Art. II, Sec. 1.) The duties of a pilot pertain to neither.

Dean et al. vs. Healy, 66 Ga., 503.

Navigation Laws of the U. S., 1899, p. 53.

The Court of Criminal Appeals of Texas, in construing this statute, says: "We are inclined to the view that a branch pilot, though appointed by the Governor, is not a public officer at all. His is merely an employment on account of his skill, and the Governor, for the advantage of commerce, and to regulate the business, grants a license to pursue the vocation. In pursuance of his employment, he exercises none of the sovereign power of the State, nor is he paid by the State, nor are his duties prescribed by any law of the State. He is merely a navigator,—one who is or ought to be familiar with taking charge of a ship, and taking it into or out of the port at the particular place where he is engaged in the business.

18 Am. & Eng. Ency. of Law, 444.

U. S. vs. Forbes, 1 Crab., 558; Fed. Cas. No. 15, 129.

Dean vs. Healy, 66 Ga., 503.

However, it is not necessary to hold that a branch pilot is not an officer of this State, and it may be that the view entertained by the Court of Civil Appeals at the present Galveston term, in the mandamus proceeding of Petterson vs. Board, 57, S. W. Rep., 1002, is correct in this regard. But, if it be conceded that a branch pilot is some sort of an officer of this State, and not a mere licensed employe; such as physician or lawyer, then it by no means follows that he is an executive officer of the State. An "executice officer" is defined to be one whose duties are mainly to cause the laws to be executed and obeyed. (Bouv. Law Dict.) An executive officer of the State is one whose duty it is to execute the laws of the State. (19 Am. & Eng. Ency. of Law, 391.) If we turn to the act creating branch pilots, we find no law of the State they are to execute. They are simply appointed to exercise their

employment or skill as pilots. These duties are prescribed by the laws of navigation, and he is merely expected, on account of his familiarity with the harbor, to steer the vessel safely into or out of port.

But we need not refer to this general definition as to who constitute executive officers of this State. Here the Constitution settles this question. Sec. 1, Art. IV, prescribes who are the executive officers of this State. It will be seen that their functions are of a high character, and certainly far transcend the duties of a branch pilot, which are prescribed by no statutory law. (Petterson vs. The State of Texas, 58 S. W. Rep., 100.) These reasons, which are from the highest court in Texas having criminal jurisdiction, apply with equal if not greater force in showing that a pilot is neither a legislative nor a judicial officer of this State. (Const., Art. II, Sec. 1.)

A State officer is one who is invested with a part of the sovereign powers of the State for the purpose of discharging some of its governmental functions. The State may prescribe the qualifications, duties, tenure and compensation of such officer, and fix the number of those who shall exercise the duties and powers that attach to such office. But it can not take from a citizen the right to pursue an occupation, profession, calling or business to which none of the functions of government attach by simply designating it an office.

If a pilot is a State officer, exercising a part of the sovereign powers of the State, then his rights as such can not be limited, regulated or taken away by Congress. Under the laws of the United States all pilots of steam vessels, whether they hold a commission from the State or not, are required to be examined and licensed by a federal board. (U. S. Rev. Stats., Sec. 4438;) (Sec. 4442, Act of Congress, Feb. 28, 1871.) By the same act he is required to take an oath that he will perform all the duties required of him by law. As Congress, under the Constitution, has control

over pilots and pilotage and has passed these acts, it would seem that a branch pilot owes his right to exercise his duties primarily to the license issued by authority of the federal government rather than to a commission issued by the Governor of the State. If he is an officer, as held by the Court of Civil Appeals, then he is *a Federal* and *not a State* officer, as his duties and tenure of office are dependent upon the will of Congress.

Under such conditions, a pilot can not be said to be a State officer, intrusted with the discharge of any of the duties pertaining to a State government. It will be seen that the two highest courts in Texas differ as to whether he is a State officer or not, and that the right of the defendants in error to maintain this suit is based upon the hypothesis that a pilot is a State officer.

U. S. vs. Hartwell, 6 Wall., 385.

Atty. Gen. vs. Drohan, 169 Mass., 534.

Shelby vs. Alcorn, 36 Miss., 273.

Vance vs. W. A. Vandercook Co., 170 U. S., 438.

The State can not take from a citizen who is a skilled seaman, and who possesses all of the qualifications necessary to pilot a vessel, his natural right to pursue his occupation. When it undertakes to limit the number of persons who may pursue such an occupation by prescribing such arbitrary and prohibitory conditions as are found in this statute, it thereby deprives the citizen of the "liberty" and "property" guaranteed him by Sec. 1, Art. XIV, of the Constitution of the United States.

The State statute is invalid, because:

1st. It abridges the privileges and immunities of a citizen of the United States.

2d. It deprives plaintiff in error of his liberty and property without due process of law.

3d. It denies to plaintiff in error the equal protection of the law.

This statute is in effect a regulation of interstate and foreign commerce and the instrumentalities thereof. Its restrictions and

limitations upon the liberty of plaintiff in error to act as a pilot are not only an abridgment, but a deprivation of the privileges and immunities guaranteed him as a citizen of the United States.

This amendment to the Constitution for the first time in the history of the country established a definition of what shall constitute citizenship of the United States, and then declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." What are the privileges and immunities guaranteed by this provision of the Constitution to citizens of the United States has never been authoritatively determined, and the extent of its application is difficult to define. The privileges and immunities here referred to, says the Supreme Court, in Slaughter House cases, 16 Wall., 79, must "owe their existence to the Federal government, its national character, its Constitution, or its laws." The right to regulate interstate and foreign commerce and the instrumentalities by which such commerce must be transported is derived directly from the commercial clause of the Federal Constitution, as is also the right to enter the harbors and to use the navigable waters of the United States. (The Fourteenth Amendment, by Brannon, 83.) The right to pilot vessels engaged in interstate or foreign commerce into and out of the ports of this State is a privilege guaranteed citizens of the United States by this clause of the Constitution and can not be destroyed by the State. The statute of Texas requires all citizens, except defendants in error, whatever may be their qualifications, to serve as a deputy under one of the branch pilots, and then leaves it optional with the branch pilot whether he will appoint a deputy or not. The right to prescribe reasonable rules by which the qualifications of a citizen to perform the duties of a pilot may be ascertained are conceded; but such rules must not be so restrictive as to prevent citizens whose qualifications are undisputed from exercising their right to navigate, or to aid others in navigating, the navigable waters of the United States.

In passing upon the right of the State to prescribe the qualifications of locomotive engineers engaged in hauling interstate commerce, the Supreme Court of the United States, in Smith vs. Alabama, 124 U. S. Rep., 480, says: "It (statute) requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant." This implies that, while a State may regulate such an occupation, it can not, under the guise of regulating, abridge the privileges of a citizen so as to prohibit his pursuing such occupation, if he possesses the requisite qualifications to perform its duties.

This section of the Federal Constitution also provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." Under this clause, every person within the jurisdiction of the United States is guaranteed the liberty to make a living in any lawful business. He has an inalienable right to apply his labor and property in his pursuit of happiness, and "the equal protection of the laws is a pledge of the protection of equal laws." (Yich Wo vs. Hopkins, 118 U. S., 356; 82 Fed. Rep., 833.)

The Supreme Court of the United States, in Powell vs. Pennsylvania, 127 U. S., 684, speaking through Justice Harlan, assents to the general proposition that the Fourteenth Amendment to the Constitution of the United States guarantees to the citizen the right to enjoy, upon terms of equality with all others in similar circumstances, the privilege of pursuing any ordinary calling or trade.

The principle we here invoke is forcibly stated by Fields, J., in his concurring opinion in Butchers' Union Co. vs. Crescent City Co., 11 U. S., 757-8. He says: "In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded

everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just and impartial laws. * * * With what intense indignation would a law be regarded that should, in like manner, turn over the common trades of the community to a single corporation. I can not believe that what is termed in the Declaration of Independence a God-given and an inalienable right can be thus ruthlessly taken from the citizen, or that there can be any abridgement of that right except by regulations alike affecting all persons of the same age, sex and condition. It can not be that a State may limit to a specified number of its people the right to practice law, the right to practice medicine, the right to preach the Gospel, the right to till the soil, or to pursue particular business or trades, and thus parcel out to different parties the various vocations and callings of life. The first section of the Fourteenth Amendment was, among other things, designed to prevent all discriminating legislation for the benefit of some to the disparagement of others."

In the same case Justice Bradley, speaking upon the powers of the Legislature of a State to create a monopoly, says: "To follow any of the common occupations of life is an inalienable right. * * * To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution." (Id., 762.)

Again he uses this language: "The ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations applying equally to all as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen

as exhibited in one of its most important aspects—the liberty of pursuit." (Id., 763.)

This principle, as stated by Justices Bradley and Harlan, is expressly approved by the Supreme Court in Allgeyer vs. Louisiana, 165 U. S., 589-591. In that case the Court also says: "The liberty mentioned in that amendment (Fourteenth Amendment of the Constitution of the United States) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoymnt of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livlihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Judge Miller, in delivering the opinion of the majority of the Court in the Slaughter House cases, 16 Wall., 36, expressly held that the statute under discussion did not deprive the butchers of the right to exercise their trade, or impose upon them any restrictions incompatible with its successful pursuit. (Id., 60.) It did not prevent them from doing their own slaughtering. On the contrary, the Slaughter House Company was required to permit any butcher who wished to do so to slaughter in their houses, and they were bound to make ample provisions for the convenience of those who wished to slaughter, prepare and sell their own meat. A reasonable compensation was allowed for the use of the accommodations furnished. (Id., 61.) The right of the State to prescribe the locality in which the slaughtering should be done was held to be a State police regulation for the protection of the health and comfort of the people within its powers. In the statute under discussion neither the public health nor morals of the people are involved, but merely the right to follow an ordinary industrial

occupation, the liberty to pursue which the State can not deprive plaintiff in error of.

Upon this point Judge Cooley says: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right can not be taken away." Cooley's Constitutional Limitations, 6th ed., 744-5.)

The Court of Appeals of New York, in People vs. Marx, 99 New York, 386, says: "No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit."

In Bertholf vs. O'Reily, 74 New York, 515 Judge Andrews says: "The right to *liberty* embraces the right of a man to exercise his faculties and to follow a lawful avocation for the support of life." And Earl, J., *in re* Jacobs, 98 N. Y., 98, says that liberty, in its broad sense, as understood in this country, means "the right of one to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

Judge Brennon, in his work on "The Fourteenth Amendment," 109-115, discusses ably the meaning of the word "liberty," as used in this amendment, and cites many authorities in support of the proposition we are here contending for.

State vs. Goodwill, 33 W. Va., 139.

State vs. Julow, 129 Mo., 172.

Ex parte Kubach, 85 Col., 274.

Leep vs. Railway Co., 58 Ark., 407.

Wally vs. Kennedy, 2 Yerg., 554.

Commonwealth vs. Perry, 155 Mass., 117.

Frorer vs. People, 141 Ill., 171.

The monopolistic features of this statute are also in violation of that clause of the section of the amendment which provides,

"No State shall deny to any person the equal protection of the law." The grant of the privilege of piloting at the port of Galveston to twelve men, and then conferring upon them the authority to determine who, if any, shall possess the qualifications required by the statute before he can be appointed a pilot, is a denial of the equal protection of the law guaranteed by this clause.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 558-567.

It is the basic principle of a free government, as declared in the Magna Charta, and the fundamental principle upon which our national and State governments were formed. It is concisely expressed in the words "Equal rights to all, ,special privileges to none." If the right of a citizen to follow an ordinary calling, whatever his qualifications therefor may be, can be taken from him and conferred upon a monopoly, then it seems to us that the language of Justice Bradley in the concluding paragraph of his opinion in Butchers' Union Co. vs. Crescent City Co., 111 U. S., 766, is particularly applicable to the case disclosed by this record, viz:

"If by legislative enactment they (monopolies) can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended."

It is well settled that the power over the subject of pilots and pilotage is conferred upon Congress by the commercial clause of the Constitution. (U. S. Const., Art. I, Sec. 8, clause 3.) This power is without limit, and it seems to us is exclusive. The Federal government is one with enumerated powers that are specified in the Constitution, and when it was adopted by the States, it became a compact that can not be added to or taken from, except in the manner provided for in the instrument itself. The sovereign powers conferred upon Congress by this compact can not be dele-

gated or surrendered without impairing our system of government. The right of Congress to surrender its powers would carry with it the ability to destroy the government.

How far Congress can adopt the machinery of the State governments to exercise any of its powers, or how far the States in the absence of congressional legislation have authority to exercise any of the powers delegated to Congress, seems not to have been determined. The sovereign powers reserved to the States and those delegated to the Federal Government are separate, and should be independent the one of the other. It has been recognized that the States, in the absence of Congressional action, have authority to regulate the subject of pilots and pilotage, although the lines of argument by which this conclusion has been reached are by no means uniform.

Cooley vs. Board of Wardens, 12 Howard, 299.

Gibbons vs. Ogden, 9 Wheaton, 207.

S. S. Co. vs. Joliffe, 2 Wallace, 459.

Ex parte McNeil, 13 Wallace, 236.

Wilson vs. McNamee, 102 U. S., 572.

See in this connection the reasoning in Vance vs. Vandercook Co., 170 U. S., 438.

At the time these decisiois were rendered Congress had not, except when it passed the act of 1789, legislated upon this subject, and most of the harbors and rivers of the United States were only known to the local pilots. These conditions are now changed. Congress has passed a law prohibiting the States from adopting any regulations or provision discriminating in the rate of pilotage between vessels or ports of other States. It has passed laws regulating the examination and licensing of pilots of steam vessels, and prescribed their duties; also laws assuming jurisdiction over the harbors and navigable rivers of the United States, and is now spending millions of dollars annually in making surveys and charts, erecting buoys, removing obstructions and otherwise im-

proving our waterways with a view of lessening the dangers and expenses of navigation and furnishing aids to commerce.

Under these conditions, it would seem that the statute of Texas, never having been adopted by Congress and being discriminative and monopolistic in its provisions, is in contravention of the Constitution and laws of the United States and void, and that the judgment of the Court below should be reversed.

Respectfully submitted,

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